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## **A ‘Last Resort’ or a ‘Bypass’? Development of Enhanced Cooperation and Its Meaning for the Problem of Stagnation of Integration in the European Union**

**Abstract:** *Completion of the Economic and Monetary Union (EMU) was the last successful ‘grand project’ in the European Union (EU). Since then, the EU has either failed or, at most, quite effectively – but only responds to the emerging challenges and problems. At the same time, along with the stagnation in the deepening of integration between all the EU member states, differentiation of integration in the EU is progressing very rapidly. This phenomenon is a consequence of a mainly two processes: reform of the euro area and the development of the enhanced cooperation. The aim of the article is to try to analyze the problem of whether enhanced cooperation is really treated as a ‘last resort’ or, rather, gradually, as a specific ‘bypass’, which make it possible to overcome obstacles relating to launching a new integration projects. The starting point of this analysis is the thesis on the stagnation of integration in the EU, that has been taking place for more than a dozen years. Very synthetically this issue is addressed in the one part of the study. The succeeding two parts concern the development of enhanced cooperation and its importance in overcoming the stagnation of integration in the EU.*

**Keywords:** enhanced cooperation, crisis in the European Union, differentiation of integration

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## Introduction

Completion of the Economic and Monetary Union (EMU) was the last successful 'grand project' in the European Union (EU). Since then, the EU has either failed or, at most, quite effectively – but only responds to the emerging challenges and problems. Moreover, *ad hoc* crisis management seems to have no end; for a dozen or so years after the EU had solved some problem, the next one appeared immediately. As a result, for a long time the EU has failed to present proposals to deepen integration of such importance as the EMU or the enlargement of Central and Eastern Europe.

At the same time, along with the stagnation in the deepening of integration between all the EU member states, differentiation of integration in the EU is progressing very rapidly. The progressing differentiation in the EU is a consequence of mainly two processes: reform of the euro area and the development of the enhanced cooperation. Reforms of the euro area were introduced following the economic and debt crisis that hit the EU after 2008 and respond to the emerging problems. And, what is especially important in the context of the topic of this article, a large part of the reforms is a result of intergovernmental process. On the other hand, enhanced cooperation applied in practice is a relatively new phenomenon. Although the relevant provisions have been introduced into the EU law under the Treaty of Amsterdam (TA), the EU Council decided for the first time to authorize the group of EU member states for enhanced cooperation in 2010. Since then, enhanced cooperation has been set up four more times. In this way, although according to the treaties enhanced cooperation should be treated as a 'last resort', it becomes one of the increasingly important forms of integration in the EU.

Therefore, the aim of the article is to try to analyze the problem of whether enhanced cooperation is really treated as a 'last resort' or, rather, gradually, as a specific 'bypass', which make it possible to overcome obstacles relating to launching a new integration projects. And, as a result, to some extent, enhanced cooperation is a way out of the problem of stagnation in the integration process in the EU.

The starting point of this analysis is the thesis on the stagnation of integration in the EU, that has been taking place for more than a dozen years. Very synthetically this issue will be addressed in the next part of the study. The succeeding two parts concern the development of enhanced cooperation and its importance in overcoming the stagnation of integration in the EU.<sup>1</sup> The main conclusions are contained in the summary.

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<sup>1</sup> The study is a development, updating and verification of the following articles on enhanced cooperation: T. Kubin, *Wzmocniona współpraca państw Unii Europejskiej w świetle*

## 1. Stagnation in the European integration process

Since the launch of the EMU in 1999, the EU failed to successfully introduce a project that would deepen integration and which could be claimed to have thoroughly changed the organisation, its institutions or common policies. Although it was possible to ratify the Treaty of Lisbon (TL), the provisions of which changed the structure and legal nature of the EU, and which are essential for its operation, it remains, nevertheless, only a reaction to the failure to ratify the Treaty establishing a Constitution for Europe.

One of the main reasons for this is that, for at least a few years, the EU has been in crisis and is struggling with a number of very serious and deep problems called crises. Among the most important are the following: economic crisis after 2008 in its results, the problem of legitimacy of the EU institutions and politicians, the increasing threat of terrorism, the increasing support for extreme, radical, euro-skeptical views, parties and political movements in the societies of the EU member states (and their influence on activities of the so-called mainstream political parties), the progressive diversification of EU integration and its impact on the future of integration within the EU, the influx of refugees/immigrants to the EU member states from the Middle East and Africa, the military conflict in Eastern Ukraine and Russia's foreign policy (especially the annexation of the Crimea Peninsula, what was the violation of the post-Cold War international order), the internal policies of the authorities of such states as Hungary or Poland in the context of respecting the values on which the EU is founded or an unprecedented event in the history of the EU (European Communities, EC), which was submission 29 March 2017 by the prime minister of the United Kingdom Theresa May (following the referendum of June 2016) notification on the exit of the UK from the EU.<sup>2</sup>

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*Traktatu z Lizbony (Enhanced Cooperation of the European Union States in the Light of the Lisbon Treaty)*, "Rocznik Integracji Europejskiej", No. 4/2010, pp. 119–135; T. Kubin, *Wzmocniona współpraca w Unii Europejskiej po raz trzeci. Postępujące zróżnicowanie integracji oraz rozwój wzmocnionej współpracy i jej znaczenie dla funkcjonowania UE (Enhanced Cooperation in the European Union for the Third Time. The Progressing Diversity of Integration, and the Development of Enhanced Cooperation and Its Importance for the Functioning of the EU)*, "Rocznik Integracji Europejskiej", No. 9/2015, pp. 57–75; T. Kubin, *Still more united than diversified? Enhanced cooperation and the progressive process of differentiated integration in the European Union and its implications*, "Progress in Economics Research", Vol. 35/2016, pp. 113–148; T. Kubin, *Enhanced cooperation, EMU reforms and their implications for differentiation in the European Union*, "Baltic Journal of European Studies", Vol. 7, No. 2(23)/2017, pp. 84–106.

<sup>2</sup> European Commission, *Statement by the European Council (Art. 50) on the UK notification*, Statement/17/793, [http://europa.eu/rapid/press-release\\_STATEMENT-17-793\\_en.htm?locale=en](http://europa.eu/rapid/press-release_STATEMENT-17-793_en.htm?locale=en) (last visited 29.03.2017).

One could say, that the EU (and before the EC) has had to deal with crises since its beginning. They have often contributed to strengthening and deepening of integration. It should be noted, however, that the current list of crises in the EU is unprecedentedly long. At the same time, some of them in its essence refer to the very meaning of the integration idea and the EU as a specific international organization. Content of the White Paper presented by the European Commission in March 2017<sup>3</sup> indicates, that the European Commission is aware of the importance of the above mentioned issues for the future of the EU.

In addition to the 'current' crises, we have in the EU a much deeper problem to deal with. It can be defined as a crisis of idea for further integration, that is the lack of a clearly defined, realistic goal of further functioning of the EU as the most important integration structure in Europe. Precisely, it is a goal that would strengthen the feeling among the EU citizens, that the existence of the Union and its institutions is something more than just a desire to only maintain integration achievements and to keep the current state of affairs. The aim, which would allow to be convinced, that the EU and its institutions do not function on their own but act to achieve something more than the current exercise of their obligations under existing legislation. A goal, that would not 'grabbed' the EU citizens, but would be attractive enough, precise and universally accepted that it would be something we aspire to and why it is worth to sacrifice something. That would strengthen the unity of Europeans, their sense of community and solidarity within the EU.

Over a dozen years ago, the situation was clearly different. In the opinions on the EU and its future prevailed optimism and sometimes even enthusiasm. For example, Robert Kagan wrote: *'Europe would be the next superpower, not only economically and politically but also militarily. [...] In the 1990s, Europeans could still confidently assert that the power of a unified Europe would restore, finally, the global "multipolarity" that had been destroyed by the Cold War and its aftermath'*.<sup>4</sup> A unique manifesto of optimism and faith in Europe was the book of Jeremy Rifkin *The European Dream. How Europe's Vision of the Future is Quietly Eclipsing the American Dream*. J. Rifkin wrote among others: *'one could point to many reasons why Europeans seem to be leading the way into the new era'*.<sup>5</sup> and 'European dream' – understood by J. Rifkin as 'an ef-

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<sup>3</sup> European Commission, *White Paper on the future of Europe. Reflections and scenarios for the EU27 by 2025*, European Commission COM(2017) 2025 of 1 March 2017, Brussels.

<sup>4</sup> R. Kagan, *Of Paradise and Power. America and Europe in the New World Order*, New York 2003, p. 20.

<sup>5</sup> J. Rifkin, *The European Dream. How Europe's Vision of the Future is Quietly Eclipsing the American Dream*, New York 2004, p. 18.

fort at creating a new historical frame', in which the most important values are peace, harmony, quality of life, sustainability, human relations, respect for cultural diversity, human rights, prosperity, global cooperation, human spiritual development, idealism (in opposition to materialism and the accumulation of wealth) – 'creates a new history'<sup>6</sup> and takes humanity into 'the light of a new future motivated by idealism'.<sup>7</sup>

Today's moods are completely different. According to Jan Zielonka, *'the European Union was once considered to be the most successful modern integration project. However, in recent years it has been a shame'*.<sup>8</sup> Zbigniew Czachór writes about the problem of 'exhaustion of ideas' relating to the EU future, what is the reason of so rare in recent years the voices about what would be the *finalite politique* of the European integration.<sup>9</sup> According to J. Zielonka, the most serious crisis in the EU is in fact the crisis of 'cohesion, imagination and trust'<sup>10</sup> and the real cause of the current disintegration are the 'unfulfilled promises' of the EU.<sup>11</sup> As a result, 'the European Union is probably doomed to destruction'.<sup>12</sup>

## 2. Development of the enhanced cooperation in the European Union

As mentioned, the provisions on enhanced cooperation were introduced into the EU law under TA. Later, in the Treaty of Nice (TN) and the Treaty of Lisbon (TL) they have been amended. In this section the legal basis of enhanced cooperation in the EU and five cases of its establishment are shown. The first three cases of enhanced cooperation have already been presented elsewhere<sup>13</sup> and in this study will only be listed. Then, only the last two cases of enhanced cooperation will be described wider.

The provisions allowing for the establishment of enhanced cooperation were contained in Art. 43–45 of the Treaty on the European Union (TEU) in a version as amended by virtue of the Treaty of Amsterdam.<sup>14</sup>

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<sup>6</sup> Ibidem, p. 22.

<sup>7</sup> Ibidem, p. 23.

<sup>8</sup> J. Zielonka, *Koniec Unii Europejskiej? (Is the EU Doomed?)*, Warszawa 2014, p. 12.

<sup>9</sup> Z. Czachór, *Kryzys w Unii Europejskiej. Propozycje nowych pól badawczych (The European Union Crisis. Proposals of New Research Fields and Questions)*, "Rocznik Integracji Europejskiej", No. 9/2015, p. 10.

<sup>10</sup> J. Zielonka, op.cit., p. 21.

<sup>11</sup> Ibidem, p. 52.

<sup>12</sup> Ibidem, p. 11.

<sup>13</sup> T. Kubin, *Still more...*, op.cit.

<sup>14</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Amsterdam, 2 October 1997, OJ 1997 C 340/1. About the course of the Intergovernmental Conference and the

The detailed arrangements concerning the possibility of establishing enhanced cooperation within the framework of the former so-called I EU pillar, were contained in art. 11 of the Treaty establishing the European Community (TEC) and in Art. 40 of the TEU<sup>15</sup> in the framework of the III EU pillar. In the former so-called II EU pillar (Common Foreign and Security Policy), the TA did not foresee any possibility to establish enhanced cooperation. One of its intermediate forms, was the so-called constructive abstention, regulated by Art. 23 of the TEU.

The Treaty of Nice<sup>16</sup> (TN) contains, among others, a few detailed amendments concerning enhanced cooperation, which were introduced to the above-mentioned articles of the TEU and the TEC. In addition, it introduced the possibility of establishing enhanced cooperation also in the former so-called II EU pillar – relevant provisions were included in art. 27a – 27e of the TEU.<sup>17</sup>

In accordance with the provisions of the Treaty of Lisbon,<sup>18</sup> arrangements for enhanced cooperation have been included both in the TEU<sup>19</sup> and in the Consolidated version of the Treaty on the functioning of the European Union.<sup>20</sup> The TEU includes title IV, i.e. ‘Provisions on enhanced cooperation’, consisting only of Art. 20 which provides a very general framework for the possibility of establishing enhanced cooperation. The detailed regulations, which clarify the content of Art. 20 of the TEU, are contained in title III of the TFEU, ‘Enhanced cooperation’ (Art. 326–334). The TL also provides for the possibility of establishing “permanent structured cooperation” (PESCO) in the area of EU’s common security and defence policy. Its general framework is governed by

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provisions on enhanced cooperation contained in the TA see: F. Tuytschaever, *Differentiation in European Law*, Oxford 1999, pp. 33–104.

<sup>15</sup> Treaty on European Union, OJ 1992 C 191/1.

<sup>16</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001, OJ 2001 C 80/1.

<sup>17</sup> T. Kubin, *Zdynamizowanie procesu integracji czy członkostwo różnych kategorii? Zagadnienie wzmocnionej współpracy w Unii Europejskiej (Speeding up the Process of Integration or Membership of Different Categories? The Issue of Enhanced Cooperation in the European Union)* in: *Unia Europejska i Polska wobec dylematów integracyjnych na początku XXI wieku (The European Union and Poland in the Face of Integration Dilemmas at the Beginning of the 21st Century)*, M. Stolarczyk (ed.), Toruń 2006, pp. 175–193.

<sup>18</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ 2007 C 306/1.

<sup>19</sup> Consolidated version of the Treaty on the European Union, OJ 2012 C 326/1.

<sup>20</sup> Consolidated version of the Treaty on the functioning of the European Union, OJ 2012 C 326/1.

Art. 42, section 6 of the TEU, whereas detailed provisions are included in Art. 46 of the TEU and in the new protocol appended to the treaties, (Protocol No 10).

Exceptions to judicial cooperation in criminal matters and police cooperation within the EU area of freedom, security and justice were introduced to the provisions contained in the said articles by virtue of the TL. In accordance with the TFEU, in the cases referred to in Art. 82, section 2, Art. 83, section 1, Art. 86, section 1, and Art. 87, section 2, the procedure for establishing enhanced cooperation is slightly different.<sup>21</sup>

For about a decade since the introduction of the TA, the provisions concerning enhanced cooperation were not used in practice.<sup>22</sup> Theoretical attempts to explain how and when enhanced cooperation is undertaken were made by e.g. Daniela A. Kroll and Dirk Leuffen.<sup>23</sup> For the first time, the EU Council decided that all the conditions required by the TEU and the TFEU for it to be established have been met, and adopted the relevant decision on 20 December 2010.<sup>24</sup> This decision concerned the applicable law for divorces and separations became applicable on 21 June 2012.<sup>25</sup>

The establishment of enhanced cooperation for the second time concerned unitary patent protection (UPP) in the EU.<sup>26</sup> The decision to undertake enhanced cooperation was taken in accordance with Art. 329, section 1 of the TFEU by the EU Council of 10 March 2011.<sup>27</sup> The package making up the UPP consists of two regulations: one concerning unitary

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<sup>21</sup> See more: T. Kubin, *Wzmocniona współpraca państw...*, op.cit.

<sup>22</sup> Till 2010 enhanced cooperation was not used in practice but was a subject of scientific interest. See, for example: M. Bordignon, S. Brusco, *On enhanced cooperation*, "Journal of Public Economics", Vol. 90/2006, Issue 10/11, pp. 2063–2090; A. de Gomes, N. Norberto, *Enhanced cooperation: the ultimate challenge of managing diversity in Europe: new perspectives on the European integration process*, "Intereconomics", Vol. 40/2005, issue 4, pp. 201–216.

<sup>23</sup> D.A. Kroll, D. Leuffen, *Enhanced cooperation in practice: An analysis of differentiated integration in EU secondary law*, "Journal of European Public Policy", Vol. 22, No. 3/2015, pp. 353–373.

<sup>24</sup> Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010 L 343/10.

<sup>25</sup> T. Kubin, *Wzmocniona współpraca w Unii...*, op.cit., pp. 62–63. On works resulting in enhanced cooperation in law for divorces and separations: K. Boele-Woelki, *To be or not to be: enhanced cooperation in international divorce law within the European Union*, "Victoria University of Wellington Law Review", Vol. 39/2008, Issue 4, pp. 779–792.

<sup>26</sup> The Road to establishing enhanced cooperation in the UPP and its legal analysis see: S. Peers, *The constitutional implications of the EU patent*, "European Constitutional Law Review", Vol. 7/2011, Issue 2, pp. 229–266.

<sup>27</sup> Council Decision of 10 March 2011 authorising enhanced cooperation in the area of creation of unitary patent protection (2011/167/EU), OJ 2011 L 76/53.



patent protection,<sup>28</sup> the related appropriate language regulations<sup>29</sup> and an international agreement that is expected to create a Single Patent Court before which disputes would be settled.<sup>30</sup>

The third instance of when enhanced cooperation was established with regard to the financial transaction tax (FTT), what was associated with the economic crisis. After the whole procedure,<sup>31</sup> the EU Council adopted a decision authorising enhanced cooperation in the area of the FTT on 22 January, 2013.<sup>32</sup> As a consequence of this decision, on 14 February, 2013 the Commission adopted a proposal concerning the Council directive on the implementation of enhanced cooperation in the field of the FTT, which was based on the Commission's proposal of 2011.<sup>33</sup> Work on this directive is still ongoing in the Council.<sup>34</sup>

The fourth decision to establish enhanced cooperation in the EU is related to property issues of international couples and forms a part of the

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<sup>28</sup> Regulation (EU) No 1257/2012 of the European Parliament and of the Council of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ 2012 L 361/1.

<sup>29</sup> Council Regulation (EU) No 1260/2012 of 17 December 2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements, OJ 2012 L 361/89.

<sup>30</sup> Agreement on a Unified Patent Court, OJ 2013 C 175/1.

<sup>31</sup> Most important steps: European Commission, Proposal for a Council Directive on a common system of financial transaction tax amending Directive 2008/7/EC, COM(2011) 594 final, Brussels, 28.09.2011; European Parliament, Legislative resolution of 23 May 2012 on the proposal for a Council directive on a common system of financial transaction tax and amending Directive 2008/7/EC (COM(2011) 0594 – C7-0355/2011 – 2011/0261(CNS)); European Economic and Social Committee, Opinion of the European Economic and Social Committee on the 'Proposal for a Council Directive on a common system of financial transaction tax and amending Directive 2008/7/EC' COM(2011) 594 final, OJ 2012 C 181/55; Committee of the Regions (2012). Opinion of the Committee of the Regions on a common system of financial transaction tax, OJ 2012 C 113/7; European Commission, Proposal for a Council decision authorising enhanced cooperation in the area of financial transaction tax, COM(2012) 631 final/2; European Parliament, Legislative resolution of 12 December 2012 on the proposal for a Council decision authorising enhanced cooperation in the area of the creation of financial transaction tax (COM(2012) 0631 – C7-0396/2012 – 2012/0298(APP)).

<sup>32</sup> Council Decision of 22 January 2013 authorising enhanced cooperation in the area of financial transaction tax (2013/52/EU), OJ 2013 L 22/11.

<sup>33</sup> European Commission, Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, COM(2013) 71 final, Brussels, 14.02.2013.

<sup>34</sup> On the FTT see, for example: L. Bettendorf, A. Van Der Horst, R. De Mooij, H. Vrijburg, *Corporate tax consolidation and enhanced cooperation in the European Union*, "Fiscal Studies", Vol. 31/2010, Issue 4, pp. 453–479.

legal regulations adopted at EU level in the area of judicial cooperation in civil matters. The road to adoption of the regulation was very long. In the Brussels Convention of 1968, matters concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters have been regulated.<sup>35</sup> Later, the Brussels Convention has been converted into regulation<sup>36</sup> (so called Brussels I regulation). Further regulations in this sphere concerned jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses<sup>37</sup> (repealed in 2003<sup>38</sup>) and insolvency proceedings.<sup>39</sup> Matters related rights in property arising out of a matrimonial relationship remained outside the ambit of any instrument applicable between the EU member states and were included in 2000 Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters.<sup>40</sup> Provisions on judicial cooperation in civil matters were also contained in Title IV of Amsterdam Treaty.

The European Council met in Brussels on 4–5 November 2004 adopted *The Hague programme: strengthening freedom, security and justice in the European Union*, in which asked the Commission to present a Green Paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition.<sup>41</sup>

In response, on 17 July 2006 the Commission adopted the *Green Paper on the conflict of laws in matters concerning matrimonial property regimes*.<sup>42</sup>

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<sup>35</sup> Original version: Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters, OJ 1978 L 304/77. Consolidated version: 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (consolidated version), OJ 1998 C27/1.

<sup>36</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.

<sup>37</sup> Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, OJ 2000 L 160/19.

<sup>38</sup> Council Regulation (EC) No 2201/2003 of 27 November 2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ 2003 L 338/1.

<sup>39</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ 2000 L 160/1.

<sup>40</sup> Draft programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters, OJ 2001 C 12/1.

<sup>41</sup> *The Hague programme: strengthening freedom, security and justice in the European Union*, OJ 2005 C 53/1.

<sup>42</sup> *Green Paper on the conflict of laws in matters concerning matrimonial property regimes*, COM(2006) 400 final, Brussels 17.07.2006.

The document launched consultations on aspects of the difficulties faced by couples in Europe when it comes to the liquidation of their common property and the legal remedies available.

At its meeting in Brussels on 10–11 December 2009, the European Council adopted another multiannual programme *The Stockholm programme – an open and secure Europe serving and protecting citizens*.<sup>43</sup>

In the *EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights*,<sup>44</sup> adopted on 27 October 2010, the Commission identified uncertainty surrounding the property rights of international couples as one of the main obstacles faced by EU citizens in their daily lives when they tried to exercise the rights the EU conferred on them across national borders. Consequently, on 16 March 2011, the Commission adopted a proposal for a two Council regulations: on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes<sup>45</sup> and regarding the property consequences of registered partnerships.<sup>46</sup>

In the context of enhanced cooperation, the Council meeting of 3 December 2015 was very significant. The Council concluded, that no unanimity could be reached for the adoption of the above mentioned proposals and that the objectives of cooperation in this area could not be attained within a reasonable period by the Union as a whole. Then, from December 2015 to February 2016, in total eighteen EU member states (see table 1) addressed requests to the Commission indicating, that they wished to establish enhanced cooperation relating to the property regimes of international couples. 2 March 2016 Commission submitted the appropriate final proposal<sup>47</sup> and 9 June 2016 Council, on requests made by eighteen EU member states, adopted the decision authorising enhanced cooperation in property regimes of international couples.<sup>48</sup> The European Parlia-

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<sup>43</sup> The Stockholm programme – An open and secure Europe serving and protecting citizens, OJ 2010 C 115/1.

<sup>44</sup> EU Citizenship Report 2010: Dismantling the obstacles to EU citizens' rights, COM(2010) 603 final, Brussels, 27.10.2010.

<sup>45</sup> Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM(2011) 126 final, Brussels, 16.03.2011.

<sup>46</sup> Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships, COM(2011) 127 final, Brussels, 16.03.2011.

<sup>47</sup> Proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes COM(2016) 106 final, Brussels, 02.03.2016.

<sup>48</sup> Council decision (EU) 2016/954 of 9 June 2016 authorising enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of deci-

ment, in its opinion of 23 June 2016, approved the Commission proposal<sup>49</sup> and 24 June 2016 Council adopted regulation implementing the 2016/954 decision on this enhanced cooperation.<sup>50</sup> On the basis of Art. 70, the regulation shall apply from 29 January 2019.<sup>51</sup>

The latest, fifth decision to establish enhanced cooperation concerns the appointment European Public Prosecutor's Office (EPPO). The legal basis of the EPPO establishment is Art. 86 TFEU. It is an independent EU institution, which main aim is to investigate and prosecute crimes against the EU's financial interests, especially the EU budget. Prosecuting offences against the EU budget was the competence of the EU member states but its authorities could act only within their own borders. At the same time, EU bodies – like OLAF (European Anti-Fraud Office), Europol or Eurojust – had not enough legal basis and practical possibilities to act in such cases efficiently. As the Commission wrote, Eurojust and Europol had *'a general mandate to facilitate exchange of information and coordinate national criminal investigations and prosecutions, but lack the power to carry out acts of investigation or prosecution themselves. The European Anti-Fraud Office (OLAF) have a mandate to investigate fraud and illegal activities affecting the EU, but its powers are limited to administrative investigations'*.<sup>52</sup> The EPPO its tasks should perform under directive (EU) 2017/1371 of the EP and of the Council.<sup>53</sup> The central office – European Chief Prosecutor – is to be supported by European Prosecutors (one in each EU member state which participate in enhanced cooperation) and investigatory and technical staff.

The main steps on the way to enhanced cooperation in the EPPO were as follows. 17 July 2013 Commission submitted proposal for a Council

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sions on the property regimes of international couples, covering both matters of matrimonial property regimes and the property consequences of registered partnerships, OJ 2016 L159/16.

<sup>49</sup> European Parliament legislative resolution of 23 June 2016 on the proposal for a Council regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM(2016) 0106 – C8-0127/2016 – 2016/0059(CNS)).

<sup>50</sup> Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ 2016 L183/1.

<sup>51</sup> Except for Art. 63 and 64 which shall apply from 29 April 2018 and Art. 65, 66 and 67 which shall apply from 29 July 2016.

<sup>52</sup> Proposal for a Council regulation on establishment of the European Public Prosecutor's Office, COM(2013) 534 final, Brussels 17.07.2013, p. 2.

<sup>53</sup> Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ 2017 L 198/29.

regulation on the establishment EPPO.<sup>54</sup> 11 December 2013 opinion of this proposal gave the Economic and Social Committee.<sup>55</sup> 7 February 2017 the Council concluded the lack of unanimity in support of the regulation creating the EPPO, what paved the way the enhanced cooperation establishment.<sup>56</sup> As a result, 3 April 2017 sixteen EU member states (later, between 19 April 2017 and 22 June 2017, next four joined them – see table 1) notified the European Parliament, the Council and the Commission of their wish to launch an enhanced cooperation to establish a EPPO.<sup>57</sup> 5 October 2017 the European Parliament adopted a legislative resolution on the draft Council regulation implementing enhanced cooperation on the establishment of the EPPO.<sup>58</sup> Finally, 12 October 2017 Council adopted regulation implementing enhanced cooperation on the establishment of the EPPO.<sup>59</sup>

As it was mentioned, TL introduced the possibility for a group of the EU member states to strengthen their cooperation in defence area by creating permanent structured cooperation (PESCO). During the meeting 22–23 June 2017, the European Council called for the joint development of capability projects in defence and agreed on the need to launch PESCO.<sup>60</sup> In September 2017, ministers of defence of the EU member states, during the informal meeting in Tallinn, presented a list of common commitments in the main areas of the Protocol 10 of the treaties, namely defence investment, capability development and operational readiness.<sup>61</sup> On 13 November 2017 ministers from 23 member states (see table 1) signed

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<sup>54</sup> Proposal for a Council regulation on establishment of the European Public Prosecutor's Office, COM(2013) 534 final, Brussels 17.07.2013.

<sup>55</sup> Economic and Social Committee: Opinion of the European Economic and Social Committee on the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office COM(2013) 534 final. SOC/491, Brussels 11 December 2013.

<sup>56</sup> Outcome of the Council Meeting. 3517th Council meeting. 6035/17, Brussels, 07.02.2017.

<http://www.consilium.europa.eu/media/22282/st06035en17.pdf> (last visited 15.11.2017).

<sup>57</sup> <http://www.consilium.europa.eu/en/press/press-releases/2017/04/03/eppo/> (last visited 15.11.2017)

<sup>58</sup> <http://www.europarl.europa.eu/oeil/popups/printsummary.pdf?id=1506690&l=en&t=E> (last visited 16.11.2017)

<sup>59</sup> Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ 2017 L 283/1.

<sup>60</sup> European Council meeting (22 and 23 June 2017) – Conclusions. EUCO 8/17 <http://data.consilium.europa.eu/doc/document/ST-8-2017-INIT/en/pdf> (last visited 16.11.2017).

<sup>61</sup> [https://eeas.europa.eu/headquarters/headquartershomepage\\_en/31832/Permanent%20Structured%20Cooperation%20on%20defence%20could%20be%20launched%20by%20end%202017](https://eeas.europa.eu/headquarters/headquartershomepage_en/31832/Permanent%20Structured%20Cooperation%20on%20defence%20could%20be%20launched%20by%20end%202017) (last visited 16.11.2017).

**Table 1. Membership of the EU states in established enhanced cooperations (in December 2017)**

State	Enhanced cooperation					
	appli- cable divorce law	unitary patent	financial tran- saction tax	property regimes of international couples	European Public Prosecutor's Office	Permanent Structured Coopera- tion
Austria	+	+	+	+	+	+
Belgium	+	+	+	+	+	+
Bulgaria	+	+	-	+	+	+
Croatia	-	-	-	+	+	+
Cyprus	-	+	-	+	+	+
Czech Republic	-	+	-	+	+	+
Denmark	-	+	-	-	-	-
Estonia	+	+	-	-	+	+
Finland	-	+	-	+	+	+
France	+	+	+	+	+	+
Greece	+	+	+	+	+	+
Germany	+	+	+	+	+	+
Hungary	+	+	-	-	-	+
Ireland	-	+	-	-	-	+
Italy	+	+	+	+	+	+
Latvia	+	+	-	-	+	+
Lithuania	+	+	-	-	+	+
Luxembourg	+	+	-	+	+	+
Malta	+	+	-	+	-	-
Netherlands	-	+	-	+	-	+
Poland	-	+	-	-	-	+
Portugal	+	+	+	+	+	+
Romania	+	+	-	-	+	+
Slovakia	-	+	+	-	+	+
Slovenia	+	+	+	+	+	+
Spain	+	-	+	+	+	+
Sweden	-	+	-	+	-	+
United Kingdom	-	+	-	-	-	-

Source: own work on the basis of relevant decisions of the Council of the EU.

a joint notification on the permanent structured cooperation, what was the first formal step to set up the PESCO. The notification contains the principles of PESCO (Annex I), list of common commitments (Annex II)

and proposals on PESCO governance (Annex III).<sup>62</sup> The notification paved the way for the Council decision launching PESCO, what is possible by the end of 2017.

### 3. Significance of the enhanced cooperation in the context of integration stagnation

Enhanced cooperation, introduced into EU primary law by the TA,<sup>63</sup> is one of the examples of the flexibility of the process of integration, and its introduction into EU's primary law was *de jure* a strengthening and confirmation of the departure from the general principle (this situation was *de facto* present from the inception of the EC<sup>64</sup>) stating, that within the framework of the integration process, all the EU (EC) member states shall adopt the same legal regulations at the same time.

Katharina Holzinger and Frank Schimmelfennig write, that *'the literature on differentiated integration shows a striking imbalance between overconceptualization, undertheorization and even less systematic data collection and analysis'*.<sup>65</sup> According to opinion of Zhelyazkova, the main theories of European integration, such as (liberal) intergovernmentalism, neofunctionalism or constructivism, *'have not tried to explain the observed patterns of differentiation. Instead, research on the causes and consequences of differentiated integration has developed from general discussions about the alleged trade-off between deeper and broader participation in multilateral agreements'*.<sup>66</sup> A synthetic overview of the theoretical approaches, concepts and typologies relating to the differentiation of integration provide K. Holzinger and F. Schimmelfennig.<sup>67</sup>

In the process of European integration, we are dealing with a set of three closely related trends: deepening (new common policies and the

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<sup>62</sup> Notification on Permanent Structured Cooperation (PESCO) to the Council and to the High Representative of the Union for Foreign Affairs and Security Policy. <http://www.consilium.europa.eu/media/31511/171113-pesco-notification.pdf> (last visited 16.11.2017).

<sup>63</sup> Enhanced cooperation apart from cooperation based on special arrangements (largely via 'protocolization') and constructive abstention and opt-outs, was one of the three types of flexibility in the TA. See: E. Philippart, G. Edwards, *The Provisions on Closer Cooperation in the Treaty of Amsterdam: The Politics of Flexibility in the European Union*, "Journal of Common Market Studies", Vol. 37, No. 1/1999, p. 98.

<sup>64</sup> T. Kubin, *Wzmocniona współpraca w Unii...*, op.cit., pp. 59–61.

<sup>65</sup> K. Holzinger, F. Schimmelfennig, *Differentiated Integration in the European Union: Many Concepts, Sparse Theory, Few Data*, "Journal of European Public Policy", Vol. 19, No. 2/2012, p. 302.

<sup>66</sup> A. Zhelyazkova, *From selective integration into selective implementation: The link between differentiated integration and conformity with EU laws*, "European Journal of Political Research", Vol. 53, No. 4/2014, pp. 727–746.

<sup>67</sup> K. Holzinger, F. Schimmelfennig, op.cit.

progressive centralisation in already existing common policies), widening (the adoption of new member states) and, especially since the 1990s, differentiation. Between them there are close interconnections and interdependencies, but their nature is clearly changing.

Though the European Communities were, generally, 'based on the principle of equal rights and obligations for all member states with respect to all Community policies',<sup>68</sup> a certain level of differentiated integration in the EC (and later in the EU) has been present since the beginning of the integration process, and the number of these differences increased as the process progressed. At the beginning of the EC, integration was limited territorially (horizontally) and functionally (vertically) with a high level of unification.<sup>69</sup> From 1958, F. Schimmelfenning and Winzen found 194 differentiations (lasting at least one year), 82 of which were introduced by the reform treaty and 112 by accession.<sup>70</sup> At the same time, before the entry into force of the TM, the scale of differentiation in the primary law was very low—only 1–2 per cent of all treaty articles had an actual differentiation. With the entry into force of the Schengen agreements, this rose to above 30 per cent. The enlargement of the EU to include countries of Central and Eastern Europe, the TL, and the reforms in the EU meant an increase in the relevant provisions of the treaties which signified a differentiation in the EU to a level of around 43 per cent at the end of 2012.<sup>71</sup>

Currently, the progressing differentiation in the EU is a consequence of three key processes. The first source of differentiation of integration is the widening of the EU. So far, the subsequent stages of EU widening (previously widening of the European Communities) were accompanied by far-reaching measures aimed at deepening integration. In a nutshell, in the 1970s, when the first enlargement of the EC was a foregone conclusion, a project which was to deepen integration included a plan to introduce a monetary union on the basis of Pierre Werner's Report. The accession of Greece, Spain and Portugal was accompanied by the introduction of di-

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<sup>68</sup> A. Kölliker, *Flexibility and European Unification. The Logic of Differentiated Integration*, Lanham 2006, p. 2.

<sup>69</sup> D. Leuffen, B. Rittberger, F. Schimmelfenning, *Differentiated Integration. Explaining Variation in the European Union*, Basingstoke 2013, pp. 26–27.

<sup>70</sup> F. Schimmelfenning, T. Winzen, *Instrumental and Constitutional Differentiation in the European Union*, "Journal of Common Market Studies", Vol. 52, No. 2/2014, p. 364.

<sup>71</sup> Ibidem, p. 358. On the differentiation in the TEEC, the SEA and the TM also writes: F. Tuytschaever, op.cit., pp. 7–32. T. Winzen writes on the differentiation in the EU in secondary law: T. Winzen, *From Capacity to Sovereignty: Legislative Politics and Differentiated Integration in the European Union*, "European Journal of Political Research", Vol. 55/2016, Issue 1, pp. 100–119.



rect elections to the European Parliament and, above all, implementation of the SEA and finalising the construction of the single market. The EU enlargement of 1995 was correlated with the establishment of the EU and in its framework, with the creation of the EMU, the Common Foreign and Security Policy and establishment of cooperation in the area of Justice and Home Affairs. Until then, there was no dilemma between deepening and widening – these two dimensions of integration went hand-in-hand. The deepening of integration did not constitute an obstacle for the subsequent countries seeking accession.<sup>72</sup> However, it is necessary to mention, such a far-fetched deepening of integration in some member states raised objections, which was manifested e.g. by regulations permitting for the UK and Denmark to remain outside the eurozone, for some EU countries to remain outside the Schengen zone or that the United Kingdom, Denmark and Ireland were not bound by provisions relating to visas, asylum, immigration and other policies related to the free movement of people. In this way, the deepening of integration contributed to its further differentiation.

The three subsequent treaties – the TA, TN and TL were supposed to reform the EU so that it was able to function effectively after accepting more than a dozen countries from Central and Eastern Europe. It should be noted that the treaty, which changed the EU the most in the context of its enlargement, i.e. the Treaty establishing a Constitution for Europe, did not enter into force and the TL was adopted in consequence of this fact. However, ever since the EU was enlarged by the countries of Central and Eastern Europe, a new situation evolved. This extension, the greatest in history, was not accompanied by an adequate, successful, deepening of integration. And differentiation of integration in the EU became *‘ad hoc responses to the challenges arising out of the growing number of Member States and their increasing differentiation’*.<sup>73</sup>

The second root of differentiation of integration in the EU are reforms of the euro area introduced in the wake of the 2008 economic crisis, which meant the deepening of integration, albeit only between states belonging to the monetary union. As a consequence, the differences in the depth of integration between the states belonging and not belonging to the euro-zone are deepening further still.

And the third source of differentiation of integration in the EU is the practical application of the provisions on enhanced cooperation, which had remained dormant for about a decade.

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<sup>72</sup> D. Leuffen, B. Rittberger, F. Schimmelfenning, op.cit., p. 21.

<sup>73</sup> J. Barcz, *Flexible Integration: a Target System of EU Governance*, “Yearbook of Polish European Studies”, Vol. 18/2015, p. 77.

The quintuple establishment of enhanced cooperation since the year 2010 means, that it is becoming an integral part of the functioning of the EU. Moreover, the issues on behalf of which enhanced cooperation was established, are not of a marginal nature, but are without a doubt very important as they affect very many actors, have a significant impact on their situation and acting and, therefore, are likely to result in conflicts of interest and disputes.

Furthermore, taking into account the categorization made by F. Tuytschaever,<sup>74</sup> it should be pointed out, that in so far as the changes in the treaties, that led to differentiation in integration before the TA, were of a 'negative' nature, i.e. they allowed certain countries of the EU (EC) not to participate in selected integrating projects. However, enhanced cooperation signified a differentiation of integration of a 'positive' nature, i.e. it provided those member states, that had the will and means with the possibility of participating in the cooperation. The difference lies in the fact, that the potential differentiation of integration resulting from enhanced cooperation is, at least theoretically, unlimited.

In the context of the influence of enhanced cooperation on the integration progress and of the main problem of this study, the following question can be posed: why should a group of EU countries, that wish to deepen integration, be restricted in their efforts to deeper integration by another state or several states unwilling to do so? It seems, that it would be difficult to justify why an EU state or a small group of states should be conferred the right to block other member states in enhancing their mutual integration. Provisions on enhanced cooperation can be seen as an answer to this problem.

The impact of enhanced cooperation on the prevention of stagnation in the process of integration can be at least twofold. Firstly, the states which establish such cooperation may become a pioneering group that sets the trends, and after some time they are joined by more member states encouraged by their example.<sup>75</sup> Such a model is delivered especially in the framework of the EMU – the first 11 EU countries qualified for the third stage of Monetary Union in 1998 were joined later by other states. As stated Danuta Hübner, a former member of the European Commission, *'what is called [...] enhanced cooperation is an important element stimulating integration. It speeds up its development'*.<sup>76</sup>

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<sup>74</sup> F. Tuytschaever, op.cit.

<sup>75</sup> A. Kölliker, op.cit.

<sup>76</sup> D. Hübner, *Przesilenie przed dobrym finałem (Turning-point before a good final)*. Interview with Danuta Hübner, "Tygodnik Powszechny", 22.06.2003.

Secondly, the possibility that only part of the member states decide to deepen integration, can act as a deterrent for the other EU member states, which approach such a deepening from a distance or even with reluctance. Fear of marginalisation, non-participation in the integration process fully, or bearing the mark of a secondary EU member state may prompt these countries to join in the efforts to deepen integration, as it might be better to participate in such a venture and attempt to influence the content of the amendments to suit its own interests from the inside than to stand on the sidelines and have no impact on the process whatsoever. The theoretical approach proposed by D.A. Kroll and D. Leuffen acknowledges, that the possibility of establishing enhanced cooperation is a factor which is conducive to the adoption of solutions by all EU member states.<sup>77</sup> In theory, remaining outside an integration project by an EU member state means greater autonomy at the expense of a smaller say on the decisions being made. Empirical studies suggest, that in some cases the difference between insiders and outsiders is vague and these countries have some influence on the content of the adopted legislation, as in the case of the United Kingdom and Denmark with regard to justice and home affairs.<sup>78</sup> The results of other studies (relating to the remaining of United Kingdom, Denmark and Sweden outside of the eurozone) indicate, that remaining outside, which results in e.g. 'decreasing access to informal networks' in the decision-making process of the EU institutions, does not actually have to take place in practice.<sup>79</sup> Therefore *'flexible integration may be a more realistic solution for dealing with intensified preference heterogeneity in the EU than previously anticipated'*.<sup>80</sup>

Another theoretical advantage of enhanced cooperation is that it is intended to prevent integration activities outside the EU framework (alternative integration<sup>81</sup>). Then, it is a kind of compromise between the unitary integration of all the EU member states (when there is no possibility of reaching an agreement) and cooperation outside the EU legal framework. In this context there is a less risk of integration differentiation than in the

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<sup>77</sup> D.A. Kroll, D. Leuffen, op.cit., p. 367.

<sup>78</sup> R. Adler-Nissen, *Behind the Scenes of Differentiated Integration: Circumventing National Opt-Outs in Justice and Home Affairs*, "Journal of European Public Policy", Vol. 16, No. 1/2009, pp. 64–65.

<sup>79</sup> D. Naurin, R. Lindahl, *Out in the cold? Flexible integration and the political status of Euro opt-outs*, "European Union Politics", Vol. 11, No. 4/2010, pp. 485–509.

<sup>80</sup> Ibidem, pp. 505–506.

<sup>81</sup> N. Groenendijk, *Enhanced cooperation: the way out or a non-starter?* in: *Unresolved Issues of the European Constitution – Rethinking the Crisis*, N. Neuwahl, S. Haack (eds.), Montreal 2007, pp. 266–274.

case of an alternative integration – because it is based on the EU law, its democratic legitimacy is stronger, it does not allow integration beyond the EU competences and because of the less transaction costs (relating to preparation, negotiation, ratification and application of a multilateral agreement). And non-EU states can not participate in it.<sup>82</sup>

However, the undertaking of enhanced cooperation by a group of EU states may lead to a series of significant complications for the process of integration. Firstly, what is most important in the context of the main problem of the article, is the right, optimal balance between supranational and intergovernmental forms of cooperation in the EU. Eric Philippart and Geoffrey Edwards wrote about the introduction of the provisions on enhanced cooperation stating 'if it is not a revolution insofar as orthodoxy was always more a pious aspiration than a reality, it is a major modification of the ethos of the Community-method'.<sup>83</sup>

On the one hand, the EU must provide an enough flexible, working mechanism of integration – what, as mentioned above, is more and more difficult in the context of the process of the EU widening. Otherwise, stagnation of integration among the all EU member states will inevitably result in proliferation of forms of cooperation outside the EU legal and institutional framework. On the other hand, enhanced cooperation should be, at least theoretically and according to its legal basis, solution of a last resort, *'the decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole'* (Art. 20.2 TEU). Five cases of enhanced cooperation (and prospects for establishing PESCO in the near future) during a few years raise a question, if each case was a really 'last resort' or rather a 'bypass'. It must be mentioned in this context, that works on the each established enhanced cooperation lasted long or very long<sup>84</sup> and that neither the treaties, nor the EU CoJ jurisdiction contain the precise definition of the term of 'reasonable period'.

But the above mentioned deterrence function of enhanced cooperation can also be looked at from another perspective. The point is that some EU member states which do not intend to take part in an integration project in the framework of the EU, may treat the risk of participat-

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<sup>82</sup> Ibidem, pp. 104–106.

<sup>83</sup> E. Philippart, G. Edwards, op.cit., p. 105.

<sup>84</sup> For example, in the case of UPP work on this system lasted over 30 years. European Commission, Proposal for a Regulation of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, COM(2011) 215 final, Brussels, 13.04.2011.

ing in enhanced cooperation by a group of EU states as a certain kind of 'blackmail'. As a result, participation in such an integration project may be perceived as something imposed, since the decision to participate in it will be made more for fear of remaining outside the mainstream of integration and being marginalised, rather than because of the perception that participation in the project is done for the interest of the state and due to a genuine desire to deepen integration.<sup>85</sup>

Secondly, if a group of the EU states participates in all (or most) of enhanced cooperations, this group will be seen as an avant-garde demonstrating a clearly deeper degree of integration compared with the other EU member states. In this situation, enhanced cooperation could become a factor leading rather to the disintegration within the EU and promoting the differentiation of the EU states rather than a deepening of their integration. This problem could be even further aggravated if the participation of the particular EU states in subsequent enhanced cooperations is concurrent with their membership in the eurozone. The consequence would be the breakdown of the EU into 'core' states and 'periphery' states. Looking at the table 1, and having in mind the EU member states participating in the eurozone, it seems, that 'the core' of the EU is gradually more and more clear.

Another problem associated with enhanced cooperation is related to the EU legal system, that is its compliance with the fundamental principles of integration in the EU, which include, among others, the principle of solidarity, equality of the member states and the unity of EU legal standards. According to e.g. Sławomir Dudzik, enhanced cooperation allows for the 'replacement, at least in some cases, of the joint efforts of all member states to achieve defined integration objectives by the actions of only some states'. It also 'introduces exemptions from the principle of equality of the member states' with regard to EU law, because it leads to an "unjustified diversification of the rights and responsibilities of the member states depending on whether they participate in circles of cooperation and how many such circles there are". In addition, the frequent use of enhanced cooperation will also 'result in a progressive fragmentation of EU's legal system' and 'a progressive erosion of the principle of unity of community order'.<sup>86</sup> Undertaking of enhanced cooperation very often by different groups of states will inevitably lead to an increasingly

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<sup>85</sup> T. Kubin, *Enhanced cooperation, EMU reforms...*, op.cit., p. 98.

<sup>86</sup> S. Dudzik, *Mechanizm wzmacnionej współpracy na tle konstytucyjnych zasad porządku prawnego Unii Europejskiej (Mechanism of enhanced cooperation against the constitutional principles of the European Union legal order)*, „Kwartalnik Prawa Publicznego”, No. 1/2003, pp. 37–38.

greater diversification of legal standards in the EU member states and to an erosion of the uniformity of the *acquis communautaire* of the EU.

The development of enhanced cooperation is a challenge also for the functioning of the EU institutional system. One problem is the participation in debates and the right to vote of the representatives of the EU member states not participating in a given policy. As noted by for example Jean-Claude Piris, theoretically, if less than half of the member states (9–13) participate in enhanced cooperation and when the consent of the Commission is required, one can imagine a situation in which the members of the Commission coming from states other than those which intend to establish enhanced cooperation, can block the adoption of a decision made by the Commission in this respect. The same applies to the European Parliament.<sup>87</sup> Hence the mentioned above ideas to legalise diverse forms of integration between EU states by concluding a certain kind of 'additional treaty' for countries wanting to participate in the deepening of integration, and in which treaty problems with the functioning of the institutions of the EU could be rectified.<sup>88</sup>

Another problem in this area is position of the Commission in the context of enhanced cooperation development. On the one hand, the Commission – as 'a driving force' of the integration process – theoretically should be interested in deepening of integration within the EU legal and institutional framework and can be expected as a supporter of the projects which result in the deepening of integration.

On the other hand, enhanced cooperation may be seen a weakening of the exclusive legislative initiative of the Commission, as it is the EU member states which are the initiators of the establishment of enhanced cooperation and they decide on its scope, content, nature, etc. As a 'guardian of the treaties', the Commission must take into account maintaining the integrity of the EU *acquis communautaire*, too. And if the Commission refuses the project of enhanced cooperation, the initiating member states have no legal possibilities to force the Commission to reconsider and change its decision.

Decisions on enhanced cooperation have been contested at the EU Court of Justice (CoJ) by states not participating in this cooperation. Actions aimed at the establishment of enhanced cooperation in the field of the UPP were met with opposition from Spain and Italy (before Italy decided to join the UPP enhanced cooperation). In judgment of 16 April

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<sup>87</sup> J.-C. Piris, *The Future of Europe: Towards a Two-Speed EU?*, Cambridge 2012, pp. 118–119.

<sup>88</sup> *Ibidem*, pp. 121–142.

2013, the EU CoJ considered all the arguments of Spain and Italy as unjustified and therefore dismissed the complaints of these member states (Joint Cases C-274/11 and C-295/11).<sup>89</sup> However, in March 2013, Spain launched two new challenges with the EU CoJ against the regulations implementing the unitary patent system. In its judgments (5 May, 2015), the EU Court of Justice fully dismissed the Spanish claims (Case-146/13).<sup>90</sup> Very interesting opinion relating to this case – and generally to the enhanced cooperation – presents Federico Fabbrini, who writes, that EU member states are allowed to resort enhanced cooperation ‘*only when they disagree whether to act jointly at the EU level but not when they disagree how to do so*’.<sup>91</sup> And according to F. Fabbrini ‘*the Council had misused its powers in authorizing an enhanced cooperation in the case*’.<sup>92</sup>

Just as in the case of the UPP, the decision of the EU Council authorising the establishment of enhanced cooperation in the field of the FTT was challenged in the EU Court of Justice, too. On April 18, 2013, the United Kingdom, on the basis of Art. 263 of the TFEU, filed a complaint for the annulment of EU Council decision 13/52/EU in connection with violation of Art. 327 of the TFEU and Art. 332 of the TFEU and the customary international law. In its judgement, the EU CoJ refuted both the pleas raised by the United Kingdom and dismissed this state’s complaint.<sup>93</sup>

So, on the one hand, enhanced cooperation can become also a cause of conflict in the EU. On the other hand, a factor that may relieve possible conflict is when groups of states participating in enhanced cooperation and those opposing it are different even if subsequent decisions on enhanced cooperation are made and challenged at the EU CoJ by member states not participating in this cooperation. This has been the case so far. As is the case in many other aspects of the functioning of the EU, today’s

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<sup>89</sup> C-274/11 and C-295/11, Kingdom of Spain and Italian Republic v. Council of the European Union [2013], ECLI:EU:C:2013:240. See on this case: E. Pistoia, *Enhanced cooperation as a tool to... enhanced integration? Spain and Italy v. Council*, “Common Market Law Review”, Vol. 51, Issue 1/2014, pp. 247–260.

<sup>90</sup> C-146/13, Kingdom of Spain v. European Parliament and Council of the European Union [2015], ECLI:EU:C:2015:298 and C-147/13, Kingdom of Spain v. Council of the European Union [2015], ECLI:EU:C:2015:299.

<sup>91</sup> F. Fabbrini, *Enhanced Cooperation Under Scrutiny: Revisiting the Law and Practice of Multi-speed Integration in the Light of the First Involvement of the EU Judiciary*, “Legal Issues of Economic Integration”, Vol. 40/2013, Issue 3, pp. 197–224.

<sup>92</sup> Ibidem.

<sup>93</sup> C-209/13, United Kingdom of Great Britain and Northern Ireland v. Council of the European Union, ECLI:EU:C:2014:283. See also on this case: M. Randall, *Case C-209/13 UK v. Council: enhanced cooperation and the FTT*, “Legal Issues of Economic Integration”, Vol. 41/2014, Issue 4, pp. 407–418.

allies can become tomorrow's opponents, which will not prevent them from cooperating again the day after that.

## Conclusions

In the past, the subsequent stages of EU (EC) widening went together with far-reaching measures aimed at deepening integration. However, the enlargement of the EU to Central and Eastern European states did not accompany such deepening. Moreover, for several years the EU has struggled with major crises, what together cause, that one can talk about stagnation in the integration process.

The most serious reforms of recent years in the EU were the reforms of economic governance in the Economic and Monetary Union. However, most of them affect only the states, whose currency is the euro. Moreover, some of these reforms (Treaty on Stability, Coordination and Governance in the Economic and Monetary Union called colloquially 'the fiscal compact', European Financial Stability Facility and the European Financial Stabilisation Mechanism) have been adopted outside the EU legal framework. This proves, that it is very difficult for the EU to reach an agreement quickly even in a crisis situation.

And the treaties do not include any effective safeguard clause preventing Member States from moving outside the treaties' framework by establishing an international agreement.

The evolution of the legal basis for enhanced cooperation – from TA to TL – is clearly aimed at facilitating its establishment.<sup>94</sup> For over a decade this form of cooperation has not been used, but since 2010 it has already been introduced five times. In addition, a special form of closer defence cooperation, PESCO, will probably be established in the near future. In this way, enhanced cooperation has become a constant form of cooperation in the EU.

One of the strengths of enhanced cooperation is that it allows for integration within the EU legal framework and with the use of the EU institutions. It is a compromise between an increasingly difficult and increasingly time-consuming Community method and intergovernmental agreements outside the EU legal framework. Perhaps, without such a form of cooperation, the EU Member States would undertake integration activities outside the EU on an even larger scale. It should be noted that this

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<sup>94</sup> On possible changes in the procedure for establishing and joining the enhanced cooperation, which would make it more flexible see for example: F. Amtenbrink, D. Kochenov, *onwards a more flexible approach to enhanced cooperation* in: *50 Years of European Integration: Foundations and Perspectives*, A. Ott, E. Vos (eds.), The Hague 2009, pp. 181–200.



problem is very important for the functioning of the EU. Steve Peers puts the question: ‘are we witnessing the birth of a new form of European Union law?’<sup>95</sup> And, analyzing the problem of using of the EU institutions in the light of the EU CoJ jurisdiction, states: ‘partial agreements using the EU institutions could play an increasingly important role in the EU legal framework – to the extent that they might rightly be considered a new form of EU law and that this case is “so prevalent, so controversial and so important in practice” that it should be taken and clarified with the treaties revision’.<sup>96</sup>

The increasing importance of enhanced cooperation in the context of stagnation in the integration process, however, raises the question of whether, because of its importance for deepening the diversity of integration in the EU, enhanced cooperation is not abused.

That is, is it really the last resort or rather a comfortable tool to bypass a group of the EU states reluctant to deepening integration? The analysis of the cases of enhanced cooperation indicates, that it addresses issues relevant for the functioning of the EU and which trigger conflicts between the EU Member States. It can also raise serious problems concerning the uniformity of the EU legal order, institutional system and the EU values. Establishing enhanced cooperation takes a lot of time, so it is unsuitable when a quick decisions are necessary. In the case of euro area reforms, intergovernmental solutions have been used outside the EU legal framework. At the same time, it can not be ruled out, that enhanced cooperation in the future will also be used in the area of economic governance in the EU.<sup>97</sup>

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<sup>95</sup> S. Peers, *Towards a New Form of EU Law?: The Use of EU Institutions Outside the EU Legal Framework*, “European Constitutional Law Review”, Vol. 9/2013, Issue 1, p. 39.

<sup>96</sup> Ibidem, p. 72.

<sup>97</sup> See, for example, the study on the possibility of using enhanced cooperation in the area of economic policy coordination and economic governance: H. Stieber, *Economic governance in a multi-speed variable-geometry Europe* in: *States, Banks and the Financing of the Economy: Fiscal Policy and Sovereign Risk Perspectives*, M. Balling, P. Egger, E. Gnan (eds.), Vienna 2013, pp. 23–64. On the financial assistance in the EU established in the legal framework of enhanced cooperation: M. Schwartz, *A memorandum of misunderstanding – the doomed road of the European Stability Mechanism and a possible way out: enhanced cooperation*, “Common Market Law Review”, Vol. 51/2014, Issue 2, pp. 389–423.

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